



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

Joseph Otis Minott
Executive Director and Chief Counsel
Clean Air Council
135 S. 19th Street
Philadelphia, PA 19101
joe.minott@cleanair.org

Re: Petition for Notice of Deficiency
Allegheny County Health Department, Allegheny County, Pennsylvania
Section 502(i) of the Clean Air Act
Alleged Inadequate Implementation of a Title V Program

Dear Mr. Minott:

The Environmental Protection Agency (EPA) is writing in response to your petition of October 20, 2016 (Petition) requesting that EPA issue a notice of deficiency to the Allegheny County Health Department (ACHD or Department) because of alleged deficiencies in its Clean Air Act (CAA) title V air operating permit program. After careful consideration, we are denying your request that EPA issue a notice of deficiency to ACHD for its implementation and enforcement of its title V air operating permit program.

As a preliminary matter, EPA is required to issue a notice of deficiency only if it first makes a determination that the title V permit authority is not adequately administering and enforcing the title V permit program. *See* CAA section 502(i)(1); *see also* Petition at 17 (recognizing that EPA must make a discretionary determination that a state is failing to adequately implement and enforce a title V program before a notice of deficiency is required under the statute and asking, for the first time in the petition, that EPA make that threshold determination). EPA has not made such a determination with regard to ACHD's title V permit program. A determination that a permitting authority is failing to adequately administer and enforce a title V permit program constitutes the sort of enforcement action over which EPA has considerable discretion. *See, e.g., Public Citizen, Inc. v. EPA*, 343 F.3d 449, 463-65 (5th Cir. 2003); *NYPIRG v. Whitman*, 321 F.3d 316, 330-32 (2d Cir. 2003). Because states are required by the statute to administer and enforce title V in a manner consistent with the terms of their own EPA-approved program, and there are potentially significant consequences for their failure to do so, EPA maintains that it is appropriate to consider all available approaches to addressing potential deficiencies in an approved title V permit program before resorting to enforcement against a coregulator.



*Printed on 100% recycled/recyclable paper with 100% post-consumer fiber and process chlorine free.
Customer Service Hotline: 1-800-438-2474*

In this case, the Department is working with EPA to address issues with its title V permit program, including the issue raised in your Petition, and in EPA's judgment the Department is making considerable progress in addressing those issues. Given these circumstances, we decline to make a determination that ACHD is not adequately administering and enforcing its title V permit program. Instead, we intend to continue working with the Department to ensure that its program is fully and effectively implemented.

Substantively, the stated basis of your Petition is the claimed "longstanding and continuing programmatic backlog in the Department's processing of Title V applications." Petition at 2. The Petition highlights the statutory and regulatory requirement to process a title V permit application within 18 months, 42 U.S.C. § 7661b(c) and 40 C.F.R. § 70.7(a)(2), and goes on to enumerate permit applications pending before ACHD for more than 18 months as well as recently issued permits/permit renewals that were issued only after delays of longer than 18 months. The Petition also references various reports from Allegheny County's Office of Controller that criticized the Department's delays in processing title V applications.

We share your concern about the time it takes for ACHD to process some title V applications, and, as noted above, EPA is currently working with ACHD to address this matter. EPA Region III conducted an evaluation of ACHD's title V program and issued a report to the Department on May 29, 2018 (Program Evaluation Report). Enclosure 1. The Program Evaluation Report identifies that the backlog of title V permits "represents an area in need of considerable attention and resources by ACHD." It also notifies the Department that if it "does not demonstrate adequate progress on resolving the identified issues, EPA will consider issuing a notice of deficiency in the future." Program Evaluation Report at 7.

In large part, the Program Evaluation Report identifies actions that ACHD can take to improve its title V permitting processes. It also directs the Department to take specific actions and submit to EPA a series of deliverables that are designed to improve the program in the short run and provide for a more sustainable program in the future. Among those suggested actions, ACHD is to:

- Eliminate the backlog of the title V permits.
- Increase permit engineers and administrative staffing levels to a level sufficient for current workloads.
- Improve data management systems and data entry processes.
- Ensure collected fees are sufficient to fund the title V program.

Since the time of your Petition, the Department has taken actions to substantially reduce its backlog of outstanding title V applications. Of the 15 facilities identified in the Petition as having not received a permit within 18 months of an application submission, ACHD has now issued 10 of those permits. Enclosure 2. Consistent with the Program Evaluation Report, the Department has submitted to EPA a Corrective Action Plan identifying timeframes to process the five outstanding permit applications. Enclosure 3.

In the Corrective Action Plan, ACHD identifies 13 title V permits and six title V permit amendments that it has issued since September 2016. Eleven of these were based on backlogged applications. Unfortunately, six other applications fell into backlog status during that time. As of the time of the Corrective Action Plan, 13 title V permit applications are in backlog or near backlog status along with one recently submitted title V application. (The 13-identified applications account for one

major source for which a formal application has not been submitted.) The Department expects to issue seven permits (more than half the backlog-or-near-backlog) from those outstanding applications by the end of 2018. In 2019, ACHD expects to issue permits based on four additional backlogged applications (which will leave only three outstanding). It is worth noting that two of the final three outstanding applications involve sources for which a title V permit has never been issued and involve particularly complicated compliance issues. The expected date of permit issuance for each of those two facilities is 2020. The final title V application before the Department was submitted in early 2018, and permit issuance is expected in 2019 or 2020, depending on the resolution of outstanding compliance issues. See Enclosure 4 for a chart depicting the actual and projected decreases in the number of outstanding title V permit applications before ACHD by calendar year; see also Enclosure 3 for detailed explanation of the timeframes and the expected permits to be issued.

In light of the recent improvements in ACHD's processing of title V permit applications, its efforts to reduce its backlog, EPA's program evaluation review and report, and the future steps the Department has committed to take in response to the evaluation report, EPA has determined that a finding of deficiency in ACHD's implementation and enforcement of its title V permit program is not warranted at this time.

As further support for its request for a notice of deficiency, the Petition references certain previous notices of deficiencies that EPA had issued to the Wisconsin Department of Natural Resources in 2004, and to Maricopa County, Arizona in 2005. Notice of Deficiency for Clean Air Act Operating Permit Program in Wisconsin, 69 Fed. Reg. 10,167 (March 4, 2004) (Wisconsin NOD); Notice of Deficiency for Clean Air Operating Permits Program; Maricopa County, AZ, 70 Fed. Reg. 32,243 (June 2, 2005) (Maricopa NOD). (When referred to jointly, the Wisconsin NOD and Maricopa NOD will be referred to as the NODs.)

These prior NODs address situations materially different than the one in this case. In both NODs, the alleged program deficiencies were more numerous and varied than the backlog issue identified in the current Petition. Further, the NODs were issued only after the permitting agencies had failed to adequately address the issues raised by EPA. In the Wisconsin matter, not only did EPA find that initial title V permits were not issued; EPA found some issued permits were inadequate and did not contain all applicable requirements. Wisconsin NOD, 69 Fed. Reg. at 10,170. Additionally, Wisconsin failed to demonstrate the adequacy of its title V fee structure. Wisconsin NOD, 69 Fed. Reg. at 10,168-10,170. The Maricopa County matter also addressed the sufficiency of title V permit fees, as well as the adequacy of the county's combined regulatory programs for title V and New Source Review permitting. Maricopa NOD, 70 Fed. Reg. at 32,244-32,246.

In both instances, the NODs were only issued after the permitting agencies, following an opportunity to submit supporting information, failed to adequately address the title V program issues EPA identified. The current ACHD matter differs from those situations in that EPA has identified a series of deliverables which the Department will have to develop and submit to the EPA in order to show that it is making adequate progress in addressing its permit backlog. ACHD also committed to identify future milestones for acting on the delayed permit applications. EPA will evaluate this new information when it is submitted along with the Department's ongoing performance. In EPA's judgment, the Department's active engagement and commitment to improvement renders a notice of deficiency inappropriate in this case at this time.

As identified in *Public Citizen*, 343 F.3d at 464, CAA section 502(i), 42 U.S.C. § 7661(a), only requires EPA to issue a notice of deficiency when it has determined that a program is not being adequately administered or enforced. This “nondiscretionary obligation arises only after a *discretionary* determination by the EPA.” *Id.* (citing *NYPIRG*, 321 F.3d at 331) (emphasis added). The court went on to clarify that “[t]he clear language of . . . § 502(i) . . . undisputedly grants the EPA the authority to initiate the [notice of deficiency] process when it deems doing so appropriate.” *Public Citizen*, 343 F.3d at 465. As EPA, in its discretion, has made no determination that ACHD is not adequately administering and enforcing its title V program, there is no mandatory duty for EPA to issue a notice of deficiency.

In sum, the recent and ongoing efforts by the Department, in conjunction with continued EPA oversight, are in our judgment improving ACHD’s processing of title V permit applications, and there is no need or basis at this time for EPA to find that the Department is failing to adequately administer and enforce the title V program and to issue a notice of deficiency. EPA retains the authority to make such a determination in the future if ACHD does not address EPA’s concerns and continue to improve its title V permit program.

EPA appreciates the Clean Air Council’s concern regarding the timeliness of title V permit issuance in Allegheny County. As the foregoing makes evident, EPA will continue to monitor the Department’s performance. If you have any questions, please do not hesitate to contact me or have your staff contact Mr. David Talley, EPA’s Environmental Engineer on this matter, at 215-814-2117 and talley.david@epa.gov.

Sincerely,

Cosmo Servidio
Regional Administrator

cc: Christopher D. Ahlers, Clean Air Council
Karen Hacker, Director, Allegheny County Health Department
Patrick McDonnell, Secretary, Pennsylvania Department of Environmental Protection

Enclosures

Enclosure 1: EPA’s Allegheny County Health Department Title V Program Evaluation Report, May 29, 2018

Enclosure 2: EPA Table - Status of Title V Permit Applications Identified in Petition, August 28, 2018

Enclosure 3: ACHD Corrective Action Plan to Eliminate Title V Operating Permit Backlog, June 26, 2018

Enclosure 4: EPA’s Chart – Actual/Projected Outstanding Title V Permit Applications before ACHD by End of Calendar Year